88-1896

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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1988

DORSEY DUNTON and DICK J. FLETCHER,

Petitioners

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 403, GALE WARD, and SIDNEY STOLPHER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION SIX

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QUESTIONS PRESENTED

1. Does the existence of outrageous conduct and intentional infliction of emotional distress in a California case involving employment discrimination preclude federal preemption under the standards of **Farmer v. Carpenters** 430 U.S. 290 (1977), where there is no curt finding of a realistic threat of interference with NLRB jurisdiction?

2. In a state tort involving employment discrimination, did the state court misinterpret the **Farmer v. Carpenters** requirement that outrageous conduct be a function of the abusive manner in which discrimination is practiced, in holding that the discrimination must be "accomplished by means of action that in itself is abusive."

3. Does abuse of power by a union business agent or an executive board member, who wrongfully denies union membership, issues death threats and threats of assault, demands financial loss from forced sale of business assets and keeps petitioners unemployed, which acts cause mental suffering, impotency, depression, and collapse of family relations, constitute discrimination practiced in an abusive manner or non-discriminatory acts which are not subject to federal preemption?

LIST OF PARTIES
RULE 28.1 LIST

The parties to the proceedings below were the petitioners Dorsey Dunton and Dick J. Fletcher and the respondents United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 403; Gale Ward and Sidney Stolpher. The first amended complaint was originally filed against the following additional parties: Southern California Pipe Trades District Council No. 16 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; Pacific Gas and Electric Company; and Pullman Power Products, Inc. Pacific Gas and Electric Company and Pullman Power Products, Inc. were not served by petitioners and the case was dismissed by the federal district court against them. Southern California Pipe Trades District Council was dismissed by the district court at petitioners' request at the pretrial hearing. These additional named parties were not parties to the trial or appellate proceedings below nor respondents before this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

To the Honorable Chief Justice William R. Rehnquist and the Honorable Associate Justices of the United States Supreme Court:

Petitioners Dorsey Dunton and Dick J. Fletcher respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Six, which was entered in the above-entitled proceeding on November 23, 1988.

OPINIONS BELOW

The opinion on rehearing of the Court of Appeal of the State of California, Second Appellate District, Division Six, is reported at 206 Cal.App.3d 44, 253 Cal.Rptr. 374, and is reprinted in the appendix hereto, at page 32, **infra**.

The original opinion of the Court of Appeal of the State of California, Second Appellate District, Division Six, has not been reported. It is reprinted in the appendix hereto, page 46, **infra**.

The memorandum order on motion to dismiss first amended complaint of the United States District Court for the Central District of California (Tashima, D.J.) is attached in the appendix hereto, page 59, **infra**.

The memorandum order of the Superior Court of the State of California in and for San Luis Obispo County (Woolpert, J.) granting a new trial and impliedly denying respondents' motion for a judgment notwithstanding the verdict is attached in the appendix hereto, page 63, **infra**.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Second Appellate District, Division Six, was entered on November 23, 1988, reversing an implied order denying a motion for judgment notwithstanding the verdict. The judgment further ordered that judgment be entered in favor of respondents on the basis that federal law preempts state court jurisdiction. The judgment of November 23, 1988 was a modification of the Court of Appeal's previous judgment rendered October 26, 1988 following petitioners' petition for rehearing. On December 12, 1988, the Court of Appeal denied petitioners' second petition for rehearing by the Court of Appeal. Thereafter, on February 15, 1989, the Supreme Court of California denied a petition for hearing. The jurisdiction of this Court is invoked under **28 U.S.C. 1257**.

STATEMENT OF THE CASE

The original complaint was filed in Superior Court of the State of California in and for the county of San Luis Obispo County, California and removed to the United States Central District Court. In August, 1983, an amended complaint was filed alleging a state tort action for intentional infliction of emotional distress as one cause of action. Respondents filed a motion to dismiss the cause of action

for intentional infliction of emotional distress on the basis that jurisdiction lay in the National Labor Relations Board (NLRB). The federal district court denied the motion, finding the alleged facts sufficient to state a claim under California law for intentional infliction of emotional distress thereby falling under the exception of NLRB preemption set forth in **Farmer v. United Brotherhood of Carpenters and Joiners**, 430 U.S. 290, (1977). (C.T. 39-42, Appendix, page) After petitioners' voluntary dismissal of the federal causes of action (C.T. 107), the case was remanded to state court for trial on the cause of action for intentional infliction of emotional distress (C.T. 122 and 123). After denial of a defense motion for summary judgment on the federal preemption issue and denial of a motion to dismiss after petitioners presented their evidence (R.T. 371), the case was tried to a jury verdict. Each of the petitioners was awarded against the respondents cumulatively the sum of $109,160 plus punitive damages in the amount of $51,810.00 against the union and two of its officials. (R.T. 629-645)

The only cause of action tried before the jury was one for the state tort of intentional infliction of emotional distress.

The jury was properly instructed:

> "Actual or threatened employment discrimination by a union is not, standing alone, outrageous conduct. The fact that a union may have engaged in employment

discrimination may not be considered in determining either liability or damages, unless you find that discrimination was accomplished in a particularly abusive manner." (C.T. 405)

They were further instructed:

"Extreme and outrageous conduct is conduct which goes beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community.

Extreme and outrageous conduct is not mere insults, indignities, threats, annoyances, petty oppressions or other trivialities. All persons must necessarily be expected and required to be hardened to a certain amount of rough language and to occasional acts that are definitely inconsiderate and unkind.

Extreme and outrageous conduct, however, is conduct which would cause an average member of the community to immediately react in outrage." (C.T. 396)

The jury was presented the following facts which in the words of the first decision of the Court of Appeal were "quite sufficient to support the jury's finding of liability ..." (Attached Appendix, page 46, **infra**.) The petitioners were long-term members of Local 403 until 1977 when they left the union to establish their own plumbing business. After refusing to sign a collective bargaining agreement with Local 403, they were fined and expelled from

membership in the union for failure to pay the fine. (R.T. 99-102, 104-105)

After financial failure and bankruptcy of their business five years later, petitioners, in desperate need of a job, contacted Local 403 and its business manager, Respondent Dale Ward, in an attempt to seek reinstatement in the union. They were advised by Respondent Ward there was a moratorium on membership which in fact was untrue and was known by Respondent Ward and the remaining respondents not to be true. Petitioners were told by respondents that "they must pay for what they did" and that union membership was opposed to their reinstatement. (R.T. 111, 326, 403)

After several weeks of denials, petitioners were not reinstated until several weeks after petitioners contacted the national union representatives who ultimately instructed respondents to reinstate petitioners. (R.T. 113, 114, 118, 120, 407 and 493)

Petitioners, who were then desperate for employment, sought to be enrolled in the hiring hall books. Petitioners were told by Respondent Ward, "well you beat me, but you have to sign Book IV." and that Respondent Ward could not remember anyone who went to work off of Book IV. (R.T. 120, 236) Placement on Book IV for petitioners was proper under the rules of the collective bargaining agreement, but Local members and other members outside the Local, who did not qualify, were being allowed to sign Book I and were put to work. The "Books" were work lists establishing hiring

preferences based on hours worked under a collective bargaining agreement and on the location of the work. (R.T. 404, 483, 198, 123-124, 153)

After being advised by respondents that the Executive Board and the membership were against the petitioners, petitioners requested the right to present their case to the Executive Board or a general meeting of union members. The petitioners' requests were refused by Respondent Ward who told them it would be a good idea if they did not go to meetings.members. The inference was that harm would come to them. (R.T. 232, 334, 482-483)

Respondent Ward continued to abuse his position as business manager of the Local by stating that if petitioners were to have any opportunity to work, they would have to sell all of their plumbing equipment from the former business. Although petitioners immediately did so at a $20,000 loss (R.T. 344-345), they were not put to work. After the passage of two more months, and the election of a new business manager, Respondent Stolpher herein, petitioners were offered employment as welders provided they dropped any claim they may have for a lawsuit against the union. Petitioners did not accept the employment because they were not welders and could not have qualified for the welding test at the nuclear power plant for which the employment was offered. (R.T. 127, 128-130, 242-243)

After this litigation was commenced petitioners were immediately put to work. Petitioner Dunton thereafter was assaulted on and off the job site, and both petitioners were harassed. Petitioner Dunton was struck at work with an elevator door. Death threats and threats of physical harm came to Petitioner Dunton both from union members and an executive board member. (R.T. 132, 139-142, 144-147, 202) Petitioner Dunton was referred to as a "rat plumber." (R.T. 141, 142, 143, 149)

When reductions in the work force took place at the Diablo Canyon Nuclear Power Plant, Petitioner Dunton was laid off 27 hours short of the 3,000 hours necessary to qualify him for Book I.(R.T. 151)

Damages caused by respondents' acts were the subject of uncontradicted testimony of petitioners and their expert at the time of trial. As a result of the abusiveness of the actions of the business agents of Local 403, petitioners suffered psychological and physical problems from the infliction of the emotional distress. These damages included impotency, high blood pressure, headaches, and disruption of close family relationships. Petitioner Dunton was virtually emasculated by not being able to support his family, and his loving relationships with his wife, children and grandchildren were impaired. Both petitioners suffered severe financial problems in addition to the loss of the equipment mentioned previously. Petitioner

Fletcher also, in addition to becoming impotent wept spontaneously, contemplated suicide, lost his home and ultimately was forced to change his residence to another location in California. The testimony of petitioners as to their mental injuries was verified by the uncontradicted testimony of a psychologist. (R.T. 135, 139, 293, 263-278)

Further evidence of outrageous abusive conduct was excluded by the trial court including evidence that petitioners were forced to leave the union because Petitioner Dunton ran against a business manager of the Local, whose campaign manager was Respondent Ward; threats that Petitioner Dunton would not work in the Local again (R.T. 96, 99-103); and evidence of discrimination in a prior NLRB judgment against Local 403 containing findings of facts showing abusiveness and threats by Executive Board member Gaddis, the same individual who threatened Petitioner Dunton. (Trial Exhibit 12, R.T. 414, 473-474; Trial Exhibit 33, C.T. 26 and 27)

After the verdict, motions for a new trial and judgment notwithstanding the verdict were made by respondents. The Trial Court granted the motion for a new trial on the grounds of insufficiency of evidence, stating that employment discrimination was not done in an abusive manner, and impliedly denied the motion for judgment notwithstanding the verdict. Petitioners appealed from the grant of a new trial and respondents appealed the denial of

the motion for judgment notwithstanding the verdict (C.T. 423, 441 and 787)

Although the Court of Appeal in its initial decision found the evidence supported the jury's verdict for intentional infliction of emotional distress, the Court of Appeal found that federal law preempts state court jurisdiction and therefore reversed the implied order denying the motion for judgment notwithstanding the verdict and ordered that judgment be entered in favor of respondents. (Appendix, page 57)

REASONS FOR GRANTING THE WRIT

I

THE APPELLATE COURT DECISION IRRECONCILABLY CONFLICTS WITH THIS COURT'S DECISION IN **FARMER v. CARPENTERS**, 430 U.S. 290 (1977)

This case presents important federal jurisdictional and procedural issues pertaining to the ability of an employee to obtain legal redress in state courts for tortious conduct by unions and their officials, which conduct is not regulated by the National Labor Relaions Act (NLRA). Given the jury's verdict and the Court of Appeal's recognition of the existence of intentional infliction of emotional distress, the lower court's decision that the action was preempted by federal law irreconcilably conflicts with this Court's holding in **Farmer v. Carpenters**, 430 U.S. 290, (1977). This Court in **Farmer** held that

the California state tort of intentional infliction of emotional distress, even in the confines of unlawful discrimination cognizable by the National Labor Relations Board, is not preempted by federal law. **Farmer** held at page 304 and 305:

> "Recovery for the tort of emotional distress under California law requires proof that the defendant intentionally engaged in outrageous conduct causing the plaintiff to sustain mental distress. [Cases cited.] The state court need not consider, much less resolve, whether a union discriminated or threatened to discriminate against an employee in terms of employment opportunities. To the contrary, the tort action can be resolved without reference to any accomodation of the special interests of unions and members in the hiring hall context.
>
> "On balance, we cannot conclude that Congress intended to oust state court jurisdiction over actions for tortious activity such as that alleged in this case. At the same time, we reiterate that concurrent state court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme... Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the paticularly abusive manner in which the discrimination is accomplished or

threatened rather than a function of the actual or threatened discrimination itself.

"Our decision rests in part on our understanding that California law permits recovery only for emotional distress sustained as a result of 'outrageous' conduct."

Outrageous conduct, which must be the basis of the California tort cause of action for intentional infliction of emotional distress, is sufficient to constitute the abusiveness necessary to find no preemption, even in an employment discrimination case which was cognizable by the NLRB. In **Farmer**, the intentional outrageous conduct under the laws of the State of California presented no realistic threat of interference with the federal regulatory scheme.

In **Atchison, Topeka & Santa Fe Ry. Co. v. Buell**, 480 U.S. 557, (1987), this Court, in refusing to hold that the RLA provides the exclusive remedy for intentional infliction of emotional distress, citing **Farmer v. Carpenters**, stated at 107 S.Ct. at 1416 ftn 13:

"In **Farmer v. Carpenters**, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed. 2d 338 (1977), we held that a state action for intentional infliction of emotional distress was not preempted by the National Labor Relations Act (NLRA), and pointed out that the risk of interference with the NLRA was minimized by the fact that state law permitted 'recov-

ery only for emotional distress sustained as a result of 'outrageous' conduct.'"

The Ninth Circuit uses the same approach, that is, if the tort of intentional infliction of emotional distress exists, preemption does not take place. In **Survival Systems v. U.S. District Court**, 825 F.2d 1416 (9th Cir. 1987), the Court stated at page 1419:

> "[4] The Supreme Court's holding in **Farmer v. Carpenters**, 430 U.S. at 305, 97 S.Ct. at 1066, that a state claim for infliction of emotional distress is not preempted if it was the result of particularly abusive conduct, provides a sound basis for the district court's conclusion that **the complaint alleged a non-preempted state claim. The allegations of the complaint, if proved, could sustain a finding that the conduct was outrageous, and thus the claim was not preempted." [Emphasis supplied.]**

In reviewing the decisions on the exercise of state court jurisdiction as opposed to federal preemption, the **Farmer** court stated at page 302:

> "No provision of the National Labor Relations Act protects the 'outrageous conduct' complained of by petitioner Hill in the second count of the complaint. Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for con-

duct on the part of union officers which is so outrageous that 'no reasonable man in civilized society should be expected to endure it.'"

It is submitted that the essence of the **Farmer** case was that the interest of the State of California in protecting the welfare of its citizens from the tort of intentional infliction of emotional distress, establishes the State's right to award damages to its citizens for protection against this type of conduct. The **Farmer** case held that state jurisdiction exists even though the conduct includes employment discrimination unlawful under federal statutes, and can involve the primary jurisdiction of the NLRB. It is submitted that the **Farmer** decision requires that a California court determine whether a cause of action exists for intentional infliction of emotional distress, and if it does, to find that the abusive manner in which discrimination is accomplished or threatened requires denial of federal preemption.

Petitioners submit that the lower court's failure to find a basis for interference with federal labor relations precludes a determination of federal preemption of the state tort.

There is no interpretation of a collective bargaining agreement necessary in this case. There is no interference with federal labor law in any way. While petitioners are aware of this Court's huge case load, it is requested that justice be granted these petitioners by the grant of a hearing in this case to give uniformity to the California decisions on preemption based on **Farmer**.

In **Farmer v. Carpenters** 430 U.S. 290, (1977), the complaint alleged that the plaintiff was subject to "frequent public ridicule," "incessant verbal abuse," and refusals to refer him to jobs in accordance with the rules of the hiring hall. The facts of the **Farmer** case, as reported, are essentially oral statements, threats and abuse. THE FACTS OF THIS CASE ARE MORE ABUSIVE, MORE PHYSICAL AND MORE ONEROUS THAN THE FACTS IN **FARMER**, and as stated in the State Court of Appeal opinion must be viewed most favorably to petitioners on the motion for judgment notwithstanding the verdict. **Hauter v. Zogast**, 14 Cal.3d 104, 120 Cal.Rptr. 681, 534 P.2d 377 (1975).

The Court of Appeal decision in this case finds that for a state court to have jurisdiction, the discrimination must have been accomplished by "**means of action that in itself was abusive**." **Dunton v. Local Union No. 403** (1988) 206 Cal.App.3d 44, 253 Cal.Rptr. 374 at page 377 (Appendix, page 46),(Emphasis added), and that no union officer utilized means that were abusive. (Despite the fact that denial of membership, forced sale of assets and veiled threats to petitioners of consequences if they attended union meetings were all done by the business agents of Respondent Local 403; death threats and assault on and off the job site were done by an executive board member.

The Court of Appeal's abusive means of action test is a perversion of the language in **Farmer**. It implies some more onerous or physical conduct is needed than was required in **Farmer**, **Idem**. In **Farmer** this Court held that it is necessary that the state tort either be unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened. **Idem**., page 305.

Farmer does not say that power exercised by denials and deprivation by a union business agent cannot be abusive. It states that the conduct must be outrageous and constitute the state tort of intentional infliction of emotional distress.

While in the instant case damage was caused by calm denial, deprivation, assaults and death threats, these facts were nonetheless abusive, constituted outrageous conduct and take the tort out of the context of federal preemption. This was essentially the finding of the District Court in this case, and the basis for the jury's verdict. It is the finding on which the State Court of Appeal found outrageous conduct to have existed. It is noted the petitioners proved outrageous conduct outside of discriminatory acts. Petitioners proved failure to admit to union membership, assault and battery, misrepresentation as to a membership moratorium, and an assortment of other acts constituting intentional infliction of emotional distress, which did not involve discrimination, (don't come to meetings, death threats, statements that nobody works from Book IV)

In this action the petitioners proved an abusive manner in which discrimination was accomplished, and an abuse of the position of business agents of Local 403 by their acts. The jury accepted this proof and brought in the verdict. The Trial Court instructed on how an abuse of a relationship can be outrageous conduct (BAJI 12.75 C.T. 350). The Court of Appeal accepted this as sufficient proof to meet the standard for outrageous conduct. There should be no federal preemption in this case. If there is, there is no remedy for petitioners. The appellate court's decision irreconcilably conflicts with the **Farmer** case and in order to secure uniformity of decision and give meaning to stare decisis, it is necessary that the Court review this decision.

II

A REVIEW OF THIS CASE AND A REVERSAL OF THE COURT OF APPEAL WILL PROMOTE UNIFORMITY OF FEDERAL AND CALIFORNIA COURT DECISIONS

In addition to the conflict with **Farmer, Idem**, the decision by the Court of Appeal in this case is contrary to the federal district court's decision on the pleadings in this case, the most recent cases on preemption by the Circuit Court of Appeals and other California Courts of Appeal.

At the trial court level before the voluntary dismissal by the petitioners of the federal causes of

action, the Federal District Court held that the complaint's allegation of threats and intimidation were sufficient to state a claim for intentional infliction of emotional distress, and since there was no federal protection for such conduct, the cause of action fell under the exemption to NLRB preemption in **Farmer v. Carpenters**, 430 U.S. 290, (1977) (See Appendix, page 61, C.T. pp. 39-42)

The Ninth Circuit in three 1987 cases and the Seventh Circuit in one 1987 case have held contrary to the California Court of Appeal decision in this case. In **Survival Systems v. U.S. District Court**, 825 F.2d 1416 (9th Cir. 1987), in a complaint alleging wrongful discharge and intentional infliction of emotional distress, on facts stating that plaintiff was held against her will and requested to commit lewd sexual acts, the Ninth Circuit held that the claim was not preempted because the complaint, if proved, could be a basis for outrageous conduct under **Farmer, Idem**.

In **Tellez v. Pacific Gas and Elec. Co., Inc.**, 817 F2d 536 (9th Cir. 1987), a case involving a complaint arising from Pacific Gas and Electric Company's dismissal of an employee for cocaine use, the Court held there was no preemption of a state cause of action for intentional infliction of emotional distress. While the court reviewed preemption on the basis of the Labor Management Relations Act Section 301 jurisdiction, the Court held that the cause of action was not inextricably inter-

twined with the labor contract and therefore under **Allis Chalmers v. Lueck**, 471 U.S. 202 (1981), the case was not preempted.

In discussing **Truex v. Garrett Freightlines, Inc.**, 784 F.2d 1347 (9th Cir. 1985) (the case relied upon heavily at the motions for a new trial and judgment n.o.v. by the respondents herein and by the trial court in its new trial order), the Tellez court found that where claims can be resolved without reference to the collective bargaining agreement, there is no preemption. The **Tellez** court stated at page 539:

> "Like the tort of defamation, intentional infliction of emotional distress hinges on state of mind, causation and injury. It requires extreme and outrageous behavior when, as in the present case, no physical injury is alleged. **Alcorn v. Anbro Eng'g, Inc.**, 2 Cal.3d 493, 497-98, 468 P.2d 216, 218 Cal.Rptr. 88, 90 (1970). The collective bargaining agreement does not envision such behavior, and its grievance mechanism is not equipped to redress it. In reviewing whether there was just cause to suspend Tellez, the grievance committee would have no authority to decide whether PG & E had acted outrageously in sending the letter. Moreover, it could provide no remedy for such behavior."

There was no reference in the trial of this case

to violations of the collective bargaining agreement or by the Court of Appeal in its decision. There is no basis for any finding that there was or is any interference with the federal regulatory scheme by the jury verdict in this case. Even the Court of Appeal decision made no finding of interference with federal labor law. There is no remedy for the respondents' acts except a state tort.

In **Paige v. Henry Kaiser Construction**, 826 F.2d 857 (9th Cir. 1987) where plaintiff employees were fired when they refused to fill generators with gas in unsafe conditions, the plaintiffs brought suit for wrongful discharge. To a defense of preemption based on **San Diego Building Trade v. Garmon**, 359 U.S. 236 (1959), the Court stated:

> "The emotional distress claims, as pled, fit within the Supreme Court's ruling in **Farmer v. United Brotherhood. of Carpenters and Joiners of America**, 430 U.S. 290, 305, 97 S.Ct. 1056, 1066, 51 L.Ed.2d 338 (1977), since they are based on the particularly abusive manner in which the distress occurred. The remaining actions, for assault, peculiar risk, and ultrahazardous activities, are not based in any way upon the collective bargaining agreement or appellants' discharge, but are based upon activity which is alleged to violate Cal/OSHA. The district court was therefore correct that non-preempted state claims have been alleged."

In **Keehr v. Consolidated Freightways**, 825 F.2d 133 (7th Cir 1987), the plaintiff sought damages for invasion of privacy and intentional infliction of emotional distress. To a defense of **San Diego Building Trade v. Garmon** 359 U.S. 236 (1959), preemption based on a claim of discrimination within the NLRB jurisdiction, the Court held that it was not preempted. The plaintiff had alleged that the defendants planned to get rid of certain employees by getting the foreman to provoke them into striking the foreman so that they could be fired. The Court stated plaintiffs were not seeking damages for discrimination but for the manner in which the plan was effected. The same is true in this case.

It is submitted that uniformity of decision with the **Farmer** case requires that the Court consider the facts in this case in part as an exercise of discrimination done in an abusive manner. **Survival Systems v. U.S. District Court**, 825 F.2d 1416 (9th Cir., 1987), **Tellez v. Pacific Gas and Elec. Co., Inc.**, 817 F.2d 536 (9th Cir. 1987), **Paige v. Henry Kaiser Construction**, 826 F.2d 857 (9th Cir. 1987), **Keehr v. Consolidated Freightways**, 825 F.2d 133 (7th Cir. 1987). Under the doctrine of stare decisis, it is also in excess of the Court of Appeal jurisdiction not to follow **Auto Equity Sales, Inc. v. Superior Court** (1962) 57 CA.2d 450 at pp. 450-455, 20 Cal.Rptr. 321, 369 P.2d 937.

III

THE APPELLATE COURT DECISION IRRECONCILABLY CONFLICTS WITH THIS COURT'S DECISIONS IN **SEARS, ROEBUCK AND CO. v. CARPENTERS**, 436 U.S. 180 (1978) AND **BELKNAP, INC. v. TEAMSTERS**, 463 U.S. 491 (1983)

The Court of Appeal's decision also conflicts with two U.S. Supreme Court cases subsequent to **Farmer, Idem., Sears, Roebuck & Co. v. Carpenters**, 436 U.S. 180, (1978) and **Belknap v. The Teamsters**, 463 U.S. 491, (1983). In **Sears**, this Court held that "the critical inquiry" in deciding whether a state claim is preempted because the challenged conduct is arguably prohibited by the federal labor laws is "whether the controversy presented to the state court is identical to . . . or different from ... that which could have been, but was not, presented to the labor board." 436 U.S. at 497.

In the instant case, petitioners submit they could not have presented the identical claim to the NLRB and therefore the claim is not subject to preemption. Furthermore, the NLRB cannot hear nor award damages for this state tort. Thus, petitioners contend the lower court is in error when it states, "Here plaintiffs plainly had an opportunity to have the NLRB resolve their dispute with the defendants had they so desired." (206 Cal.App.3d 44, 253 Cal.Rptr. 374, 379 (1988)).

Failure to admit members to a union is a state

tort **Ezekial v. Winkley** (1977) 20 Cal.3d 267 142 Cal.Rptr. 418, 572 P.2d 32. The NLRA has been held not to preempt state court jurisdiction over a state law claim for actionable misrepresentations where the controversy differs from that which could be presented to the NLRB, **Belknap, Inc. v. The Teamsters**, 463 U.S. 491 (1983), or over a state law claim for a liability arising out of a labor dispute so long as the libel was issued with knowledge of its falsity or with a reckless disregard of whether it was true or false. **Lynn v. United Plant Guardworkers**, 383 U.S. 53, (1966). The NLRA does not preempt state court jurisdiction over suits involving violence or intimidation even though such conduct occurred in a labor dispute which would otherwise be subject to the NLRA. **United Constr. Workers v. Laburnum Constr. Corp.**, 347 U.S. 656 (1954); **International Union, United Auto, etc. v. Russell**, 356 U.S. 634 (1958); **United Mineworkers v. Gibbs**, 383 U.S. 715 (1966). The NLRA has been held not to preempt state court jurisdiction over suits against unions for wrongful expulsion from a union. **Vaca v. Sipes**, 386 U.S. 171 (1967) and for unreasonable disciplinary fines **NLRB v. Boeing Co.**, 412 U.S. 67 (1973).

Although this Court in **Farmer** found that the allegations might form the basis for unfair labor practice charges with the NLRB, the claim was not preempted because the state had substantial interest in regulation of the conduct at issue and the

state's interest was one that did not threaten undue interference with federal regulatory statutes In **Farmer**, as in the instant case, since no provision of the NLRA protects the outrageous conduct complained of, and if a complaint were filed with the NLRB, the focus of the unfair labor practice proceeding would be on the hiring hall discrimination without any consideration of the emotional distress for which the NLRB could not award damages, the NLRB could not resolve the dispute. Further, as instructed by **Farmer**, the Trial Court did instruct the jury that the fact of employment discrimination as distinguished from attendant tortious conduct under state law should not enter into the determination of liability or damages.

Belknap v. The Teamsters, 463 U.S. 491 reflects the length to which this Court has gone to protect local jurisdiction. This case holds that misrepresentation by an employer to employees hired to replace striking employees during a labor dispute was of peripheral concern to the NLRB act, and was a concern deeply rooted in local law, (despite the opposition of the union, the employees and the United States government in amicus briefs.) The Court states at page 500:

> "Even more mystifying is the suggestion that the federal law shields the employer from damage suits for misrepresentations that are made during the process of securing permanent replacements and are actionable under state law."

Even in the midst of unfair labor practice charges, the issues must be identical or local concern will control, if there is no federal interference. The **Belknap** case and this case both involve misrepresentations.

Belknap, Id., p. 509 reaffirmed the **Sears** test and in speaking of the federal question stated:

> "... the focus of these determinations, however, would be on whether the rights of strikers were being infringed. Neither controversy would have anything in common with the question whether **Belknap** made misrepresentations that were actionable under state law. The Board would be concerned with the impact on the strikers, not whether the employer deceived the replacements."

Local jurisdiction was again protected contrary to the decision by the Appellate Court of Appeals.

IV

THE DECISION BELOW RAISES IMPORTANT AND UNRESOLVED PROBLEMS

Although **Farmer v. Carpenters** provides clear guidance in determining whether a California intentional emotional distress action is preempted by the National Labor Relations Act, there remains considerable confusion amongst the lower courts regarding the proper forum to adjudicate inten-

tional emotional distress claims, oftentimes leaving the plaintiff with no legal redress against a union and its officials. Furthermore, the lack of certainty is causing considerable expenditures of judicial time in both the federal and state courts to readdress the preemption issue.

For example, in the instant case, the preemption issue has been addressed and argued on at least six occasions. Respondents claimed preemption at the time the action was removed to federal district court, when they brought the motions in federal court to dismiss the cause of action for intentional infliction of emotional distress on the basis of National Labor Relations Board preemption; in a summary judgment motion; in a motion for nonsuit; during the trial; and in the motions for a new trial and judgment notwithstanding the verdict at the trial court and on appeal.

In presenting their state tort claim, petitioners have found themselves bounced from the state court to the federal court and back to the state court only to find the state trial court vacating the jury verdict on the basis that the action was preempted by the NLRA.

In the instant case, the federal district court agreed that the petitioners had alleged facts, including physical threats and intimidation, sufficient to state a claim under California law for intentional infliction of emotional distress. The jury, based on proper jury instructions, found intentional

infliction of emotional distress based on outrageous conduct and the Court of Appeal in its original decision found sufficient evidence to prove this California tort. (Appendix, page 46)

The issue of preemption is arising with increasing frequency in both state and federal courts resulting in conflicting decisions. In California over the last year, there have been a number of cases addressing the preemption issue and conflicting decisions have been rendered. For example, the recently decertified case of **Alpha Beta, Inc. v. Superior Court (Nahm)**, formerly cited as 198 Cal.App.3d 1390, 244 Cal.Rptr. 414, which case was previously granted certiorari by this Court remanded with directions to the California Court of Appeal, First District. Although decertified and therefore of no precedential value, a copy of the most recent decertified decision in the **Alpha Beta** case is attached to the Appendix at page 66.

In **Alpha Beta**, the employee sued for intentional infliction of emotional distress. The defendants moved for summary judgment on the grounds of preemption by a federal labor law which motion was denied. Defendants then petitioned for a writ of prohibition or mandate which was summarily denied by the Court of Appeal, First District, but granted by the California Supreme Court. The California Supreme Court transferred the matter to the Court of Appeal with directions, and the Court of Appeal again concluded there was no preemption,

vacated the alternative writ and denied the preemptory writ. Thereafter, the California Supreme Court denied review; the U.S. Supreme Court granted certiorari and remanded the case with directions. After reconsidering the matter the Court of Appeal once again held there was no preemption. Thereafter the California Supreme Court granted review and directed reconsideration of the Court of Appeal's opinion. After reconsideration, the Court of Appeal again found no preemption in its opinion rendered February 26, 1988. Thereafter, the California Supreme Court decertified the opinion which had formerly been cited as 198 Cal.App.3d 1390, 244 Cal.Rptr. 414. On November 17, 1988, this court denied a petition for writ of certiorari. That case is now ready to proceed to trial and should plaintiffs prevail they will undoubtedly be subjected to the same post trial preemption claims presented in the instant case.

The procedural facts of **Alpha Beta, Inc. v. Superior Ct.** emphasize the need for uniformity of decisions in this area. Other recent California cases evidencing the confusion regarding jurisdiction to determine state tort claims against unions include **Abreu v. Svenhard's Swedish Bakery, et al.** (1989) 208 Cal.App.3d 1446, 257 Cal.Rptr. 26 (finding preemption) and **Screen Extras Guild, Inc. v. Superior Court** (April 1989) 89 Daily Journal DAR 4602 (finding no preemption for state wrongful discharge claims). There are also a pletho-

ra of cases in federal district court which add further confusion to the doctrine of preemption when a state tort claim is presented. **Scott v. Machinists Automotive Trades D Lodge 190**, 827 F.2d 589, 594 (9th Cir. 1987); **Moore v. General Motors Corp.** 739 F.2d 311 (8th Cir. 1984); **Buscemi v. McDonnell Douglas Co.** 736 F.2d 1348 (9th Cir. 1984); **Bloom v. Intern. Broth. of Teamsters Local 468**, 752 F.2d 1312 (1984).

The end result of these conflicting decisions is that employees such as petitioners are subjected to a multitude of judicial motions in both federal and state court and may be afforded no remedy for tortious acts by a union and its officials.

CONCLUSION

This case should be heard to secure the proper jurisdiction in this case. If the state remedy is not available, petitioners will have no remedy.

Respectfully submitted.

Ray A. Gallo
Attorney for Petitioners

DATED: May 12, 1989

STATEMENT OF RELATED CASES

Pursuant to Rules of the United States Supreme Court, Petitioners know of no cases that are related to this Petition which are now pending before this Court.

DATED: May 12, 1989

RAY A. GALLO
Attorney for Petitioner

APPENDIX

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 6 No B026226

S008160

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

DORSEY DUNTON et al.,

vs.

UNITED ASSOCIATION OF JOURNEYMEN, etc., et al.

Appellants' petition for review DENIED.

SUPREME COURT
FILED
FEB 15 1989
Robert Wandruff Clerk
Deputy

LUCAS

Chief Justice

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

2d Civil No. B026226
(Super. Ct. No. 57373)
(San Luis Obispo County)

OPINION ON REHEARING

COURT OF APPEAL—SECOND DIST.
FILED
NOV 23 1988
ROBERT N. WILSON Clerk

Deputy Clerk

DORSEY DUNTON, et al.,

Plaintiffs and Appellants.

v.

UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING
AND PIPEFITTING INDUSTRY OF THE

UNITED STATES AND CANADA, LOCAL UNION NO. 403, SAN LUIS OBISPO, CALIFORNIA, et al.,

Defendants and Respondents.

Plaintiffs, union plumbers, filed suit against their local union and others on a cause of action not disclosed by the record. The case was removed to federal court, where an amended complaint was filed, seeking money damages on four causes of action: (1) for improper discrimination by the union; (2) for breach of fair union representation; (3) for breach of a collective bargaining agreement; and (4) pursuant to California decisional law for intentional infliction of emotional distress. They ultimately moved to dismiss the first three causes of action, which motion the federal court granted with prejudice. They then obtained an order retransferring the case to the San Luis Obispo Superior Court. There they obtained jury verdicts against United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 403, San Luis Obispo, California (local union), and two individual defendants, Stolper and Ward, local union officers, for a total of $218,320 compensatory damages. In addition, there were punitive damage awards of $100,000 against the local union, $2,460

against Stolper, and $1,060 against Ward. Defendants' motion for a new trial was granted on the ground that the evidence was insufficient to support the verdict, and no ruling was made on their motion for judgment notwithstanding the verdict. Plaintiffs appeal from the order granting a new trial. (**Code Civ. Proc., §904.1, subd. (d)**.) Defendants appeal from the implied denial (**Code Civ. Proc., §629**) of their motion for judgment notwithstanding the verdict.

We find that the gravamen of the case was employment discrimination (subject to preemption by federal statutes), that such discrimination was not merely preipheral to issues committed solely to the National Labor Relations Board (NLRB), and that there was no evidence that such discrimination was carried out in an abusive manner. In these circumstances, federal law preempts state court jurisdiction. (**San Diego Bldg. Trades Council v. Garmon** (1959) 359 U.S. 236; **Farmer v. Carpenters** (1977) 430 U.S. 290; see **Belknap, Inc. v. Hale** (1983) 463 U.S. 491, 498.) We therefore reverse the implied order denying the motion for judgment notwithstanding the verdict, and order that judgment be entered in favor of defendants. This makes it unnecessary to review plaintiffs' claim that the motion for new trial was granted erroneously.

FACTS

In reviewing the denial of the motion for judgment notwithstanding the verdict, we accept the evidence most favorable to plaintiffs and disregard all conflicting evidence. (**Hauter v. Zogarts** (1975) 14 Cal.3d 104.)[1]

Plaintiffs were journeymen plumbers and members of defendant local union. In 1977 they established their own plumbing business as a plumbing contractor operating a non-union shop. They refused to sign a collective bargaining agreement with defendant local union, and as a result were fined $150 and expelled from membership for failure to pay the fine.

In 1981 their corporation was adjudged bankrupt, but they continued to operate the business as individuals until July 1982. In October or November 1982 they contacted defendant local union, offered to pay the fine, and sought reinstatement as members. Their reinstatement at first was denied

1) Plaintiffs claim that the trial court erred in sustaining objections to the admission of evidence that on a prior occasion the defendant local union, through different officers, discriminated against other persons. Such evidence, if relevant at all, would only tend to support plaintiffs' evidence as to what happened in this case. Inasmuch as we accept plaintiffs' evidence as to what happened in this case, exclusion of evidence in possible support thereof is of no significance.

on the ground that there was a moratorium on new memberships, which was not true, and after they communicated with an official at the international office of the union with which the local was affiliated, they were reinstated. A period of "several weeks" elapsed from their application to actual reinstatement. Defendant Stolper during this period refused to reinstate them, although he knew that they were entitled to reinstatement. He told plaintiffs that they would have to pay for what they had done. Defendant Ward told them not to come to executive board meetings—that he, Ward, would represent them, and that they should not attend general membership meetings because they would be hurt, but Ward did not threaten either of them with physical harm.

Upon reinstatement, plaintiffs were allowed to sign only book 4, which was the lowest priority work referral book of the local union. They were not eligible under union rules to sign any higher priority book. Other members of defendant local union who likewise were ineligible for priority above book 4 were allowed to sign higher priority books, and were referred to work.

In an attempt to qualify for higher priority, plaintiffs requested that the local union sign a collective bargaining contract with them in their capacity as a business. The local union, through its attorney, replied that entry into a collective bargain-

ing agreement was discretionary with the local union. No such agreement was signed.

Defendant Ward told plaintiffs that if they were going to have any chance of returning to work they would have to liquidate their old business plumbing equipment. They did so about January 1983 at a loss of approximately $20,000.

Defendant Stolper, acting on behalf of the local union, told plaintiffs that if there were no lawsuits pending they could go to work as welders, and offered them training as welders. Plaintiffs refused, believing that they did not and could not qualify as welders.

Within two weeks following this conversation, the present lawsuit was filed. Three or four days thereafter, on April 18, 1983, plaintiffs were referred to work as plumbers and became employed as such at the Diablo nuclear energy power plant being constructed by or for Pacific Gas and Electric Company. They continued such work until June or July of 1984, at which time they were laid off.

On the job at the Diablo plaint, plaintiff Dunton was harassed and referred to as a "rat plumber" by one of his co-worker, rank-and-file local union members. He was subject to other harassment, both on and off the job, by other rank-and-file members and by one member of the local union's executive board.

The general plumbing foreman at the Diablo job was a member of defendant local union. He did not offer either plaintiff overtime work although other plumbers worked overtime. Neither plaintiff was appointed by the general foreman to be a foreman, although they were both qualified.

As a result of the foregoing, plaintiffs suffered economic hardship and emotional distress resulting in psychological and physical problems, including depression, headaches, high blood pressure and impotency.

DISCUSSION

The basic question on this appeal is not whether the evidence supported a cause of action under California law for the intentional infliction of emotional distress. The critical question is whether liability for conduct of defendants that caused emotional distress is governed by federal law and subject only to federal determination.

It is well established that in cases alleging discrimination on the part of a union in operating a hiring hall, the federal forum is exclusive unless the discrimination was accomplished by means of action that in itself was abusive. (**Farmer v. Carpenters, supra**, 430 U.S. 290, 305.) State court jurisdiction is lacking where the crux of the claim is covered by the National Labor Relations Act

(NLRA). Alleged discrimination in job referral by a union is within the primary jurisdiction of the NLRB. (**29 U.S.C. §158(b)**; see, e.g., **Association of Journeymen v. Borden** (1963) 373 U.S. 690, 694-696; **Carter v. Sheet Metal Wkrs.' Intern. Ass'n.** (11th Cir. 1984) 724 F.2d 1472, 1477.) Where, as here, the "crux" of the dispute concerns the operation of a union hiring hall, a state tort claim based on the same conduct is presumptively preempted. (**Motor Coach Employees v. Lockridge** (1971) 403 U.S. 274, 295-296; **Borden, supra**, at pp. 697-698; **Carter, supra**, at p. 1477.)

An example of discrimination accomplished by means of abusive conduct is presented in **Richardson v. Communications Workers of America** (8th Cir. 1971) 443 F.2d 974. Plaintiff in that case was the subject of an estimable 1000 vile and derogatory signs, constant chanting of the epithet, "scab," jeering, gesturing, a rain of nuts, bolts and screws thrown at him, intentional cigarette burns, vandalism of his car and locker, and vulgarities about his wife. (**Id.**, at p. 983, fn. 12.) Examples of discrimination by a union in referring members for employment, accomplished by means that were not sufficiently abusive to avoid preemption are presented in **Truex v. Garrett Freightlines, Inc.** (9th Cir. 1985) 784 F.2d 1347 (claim for emotional distress based upon a campaign of harassment in the assignment of work duties, abusive language

and excessive surveillance was preempted); **Buscami v. McDonnell Douglas Corp.** (9th Cir. 1984) 736 F.2d 1348, 1351-1352 (same result where plaintiff alleged emotional distress based upon the callous and insensitive manner of his termination); **Carter v. Sheet Metal Wkrs.' Intern. Ass'n, supra**, 724 F.2d at pp. 1477-1478 (same result with respect to a union conspiracy to prevent the plaintiff from working by refusing to issue a withdrawal card and then refusing to reinstate him); and **Magnuson v. Burlington Northern, Inc.** (9th Cir. 1978) 576 F.2d 1367, 1368-1369 (same result regarding defendants' cover-up of their negligence and conspiracy to have plaintiff discharged).

With these general principles in mind, we review the evidence. Before doing so, however, we consider whether defendants' motives for their actions are of any significance. Insofar as discrimination in referring for work is concerned, motive is irrelevant. For a state court to have jurisdiction, the discrimination must have been accomplished by abusive means. Objectionable motives are no substitute for objectionable means. Discrimination is forbidden by the NLRA whether it be for mildly objectionable motives or motives that are atrocious. The outrageousness of the motive is significant in determining liability under state law for the intentional infliction of emotional distress, but not in determining whether there has been federal preemption.

It is not contended that there was anything tortious in the fining of plaintiffs for operating a non-union shop while they were members of the union, or in expelling them for failure to pay the fine. They were denied readmission to the union for a period of several weeks, but the evidence shows no more than that they were not admitted. This may well have constituted wrongful discrimination,but it was not accomplished by abusive action.

When readmitted to the union, they were placed in book 4, the lowest priority for job referral. They readily concede, as they did at trial, that such placement was correct under the applicable written standards of the union, but argue that it was discriminatory because other union members were placed in a higher priority classification without being qualified therefor. Was this discrimination? The answer is probably yes. Was it done in an abusive manner? The answer is no. The union officer merely stated that plaintiffs would have to sign book 4.

There is evidence that plaintiffs were told to sell their business equipment if they desired to qualify for a higher priority, which they did at a substantial loss. This, too, was discriminatory, but it was done by a plain statement that in itself was not abusively made.

Plaintiffs' business was refused a collective bargaining contract. At that time the business was

defunct. There is no contention that the defendant local union was legally obligated to enter into such a contract with plaintiffs, and its refusal to do so was not abusive or tortious.

The discussion regarding welding is of little significance. Plaintiffs were offered an opportunity to go into a different field if no lawsuits were pending, and they declined to do so. This led to no untoward result, was not discriminatory and was not done abusively.

The acts of harassment attributed to rank-and-file members of defendant local union and to one member of its executive board are of no significance. There was no evidence, direct or circumstantial, that such activity was authorized or ratified by the local union, its governing board, or any of its officers or agents. For the same reason, we disregard complaints that plaintiffs' employer discriminated against plaintiffs with regard to overtime work and promotions. Although the employer's agent was a member of defendant local union, there was no evidence that he was anything but a rank-and-file member of the local union itself, or that he was acting on behalf of anyone other than the employer.

The record does not indicate that any officer of the local union threatened or caused physical harm, subjected either plaintiff to ridicule, used vile language, yelled, screamed, or did anything physically or emotionally abusive. As indicated by the trial

judge, defendants' actions were properly categorized as "'garden variety'" discrimination.

Plaintiffs claim that **Sears, Roebuck & Co. v. Carpenters** (1978) 436 U.S. 180, has effectively overruled the controlling theory of preemption based upon the NLRB's primary jurisdiction over a wide range of labor disputes. **Sears** involved a state court action to enjoin picketing which constituted a continuing trespass under state law. The legality of the picketing was not otherwise addressed. (**Id.**, at p. 185.) The Supreme Court determined that preemption of the trespass action was **not** required for two reasons. First, the trespass action would not involve the federal labor issues of whether the picketing was legal; **only the location** of the picketing, a uniquely local concern, was challenged. (**Id.**, at p. 198.) **Sears** also held that when a claim of preemption is based upon conduct which is "arguably protected" under the NLRA, the aggrieved party suing in state court must have a "reasonable opportunity" to have the dispute resolved by the NLRB, either by filing a complaint itself or inducing its adversary to do so. (**Id.**, at pp. 200-201.) Otherwise, the dispute would be incapable of resolution since it would not be brought before the NLRB and preemption would preclude its resolution by state courts. (**Id.**, at p. 202.) Since such a stalemate had occurred in **Sears**, preemption was not required.

Here plaintiffs plainly had an opportunity to

have the NLRB resolve their dispute with defendants had they so desired.

Plaintiffs also contend that federal preemption has been limited by **Belknap, Inc. v. Hale, supra**. 463 U.S. 491. There the Supreme Court held that strike breakers could sue in state courts on a claim that the employer made misrepresentations to them and breached contracts concerning their continued employment after a strike ended. The claim of the strike breakers had nothing to do with the rights of the strikers, the strike, or collective bargaining, with which the NLRB was concerned. The dispute was peripheral to the NLRA and therefore subject to state court jurisdiction. That is far different than the claims with which we are concerned—discriminatory classification of union members in the administration of a union hiring hall, prohibited by **29 United States Code §158(b)**.

The order denying defendants' motion for judgment notwithstanding the verdict is reversed and the trial court is ordered to enter judgment for defendants.

Each side shall bear its own costs on appeal.

CERTIFIED FOR PUBLICATION.

WILLARD, J.*

We concur:

STONE, P.J.

ABBE, J.

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*Retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council

Harry E. Woolpert, Judge
Superior Court County of San Luis Obispo

Ogle, Gallo & Merzon and Ray A. Gallo, for Plaintiffs and Appellants.

Crosby, Heafey, Roach & May and Richard de Saint Phalle and Joseph P. Mascovich, for Defendants and Respondents.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

2d Civil No. B026226
(Super. Ct. No. 57373)
(San Luis Obispo County)

FILED
Oct 26 1988
Robert Clerk
Deputy Clerk

DORSEY DUNTON, et al.,

Plaintiffs and Appellants,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STAES AND CANADA, LOCAL UNION NO. 403, SAN LUIS OBISPO, CALIFORNIA, et al.,

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We find that the gravamen of the case was employment discrimination (subject to preemption by federal statutes), that such discrimination was not merely peripheral to issues committed solely to the National Labor Relations Board (NLRB), and that there was no evidence that such discrimination was carried out in an abusive manner. In these circumstances, federal law preempts state court jurisdiction. (**San Diego Bldg. Trades Council v. Garmon** (1959) 359 U.S. 236; **Farmer v. Carpenters** (1977) 430 U.S. 290; see **Belknap, Inc. v. Hale** (1983) 463 U.S. 491, 498.) We therefore reverse the implied order denying the motion for judgment notwithstanding the verdict, and order that judgment be entered in favor of defendants. This makes it unnecessary to review plaintiffs' claim that the motion for new trial was granted erroneously.

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In reviewing the denial of the motion for judgment notwithstanding the verdict, we accept the evidence most favorable to respondents and disregard all conflicting evidence. (**Hauter v. Zogarts** (1975) 14 Cal.3d 104.)

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In 1981 their corporation was adjudged bankrupt, but they continued to operate the business as individuals until July 1982. In October or November 1982 they contacted defendant local union, offered to pay the fine, and sought reinstatement as members. Their reinstatement at first was denied on the ground that there was a moratorium on new memberships, but after they communicated with an official at the international office of the union with which the local was affiliated, they were reinstated. A period of "several weeks" elapsed from their application to actual reinstatement. Defendant Stolper during this period refused to reinstate them, although he knew that they were entitled to reinstatement. He told plaintiffs that they would have to pay for what they had done.

Upon reinstatement, plaintiffs were allowed to sign only book 4, which was the lowest priority work referral book of the local union. They were not eligible under union rules to sign any higher priority book. Other members of defendant local union who likewise were ineligible for priority above book 4 were allowed to sign higher priority books, and were referred to work.

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Defendant Stolper, acting on behalf of the local union, told plaintiffs that if there were no lawsuits pending they could go to work as welders, and offered them training as welders. Plaintiffs refused, believing that they did not and could not qualify as welders.

Within two weeks following this conversation, the present lawsuit was filed. Three or four days thereafter, on April 18, 1983, plaintiffs were referred to work as plumbers and became employed as such at the Diablo nuclear energy power plant being constructed by or for Pacific Gas and Electric Company. They continued such work until June or July of 1984, at which time they were laid off.

On the job at the Diablo plant, plaintiff Dunton has harassed and referred to as a "rat plumber" by one of his co-worker, rank-and-file local union

members. He was subject to other harassment, both on and off the job, by other rank-and-file members.

The general plumbing foreman at the Diablo job was a member of defendant local union. He did not offer either plaintiff overtime work, although other plumbers worked overtime. Neither plaintiff was appointed by the general foreman to be a foreman, although they were both qualified.

As a result of the foregoing, plaintiffs suffered economic hardship and emotional distress resulting in psychological and physical problems, including depression, headaches, high blood pressure and impotency.

DISCUSSION

The basic question on this appeal is not whether the evidence supported a cause of action under California law for the intentional infliction of emotional distress. The evidence was quite sufficient to support the jury's finding of liability in that regard. The critical question is whether liability for the conduct of defendants that caused such distress is governed by federal law and subject only to federal determination.

It is well established that in cases alleging discrimination on the part of a union in operating a hiring hall, the federal forum is exclusive unless the

discrimination was accomplished by means of action that in itself was abusive. (**Farmer v. Carpenters, supra**, 430 U.S. 290, 305.) State court jurisdiction is lacking where the crux of the claim is covered by the National Labor Relations Act (NLRA). Alleged discrimination in job referral by a union is within the primary jurisdiction of the NLRB. (**29 U.S.C. §158(b)**; see, e.g., **Association of Journeymen v. Borden** (1963) 373 U.S. 690; 694-696; **Carter v. Sheet Metal Wkrs.' Intern. Ass'n** (11th Cir. 1984) 724 F.2d 1472, 1477.) Where, as here, the "crux" of the dispute concerns the operation of a union hiring hall, a state tort claim based on the same conduct is presumptively preempted. (**Motor Coach Employees v. Lockridge** (1971) 403 U.S. 274, 295-296; **Borden, supra**, at pp. 697-698; **Carter, supra**, at p. 1477.)

An example of discrimination accomplished by means of abusive conduct is presented in **Richardson v. Communications Workers of America** (8th Cir. 1971) 443 F.2d 974. Plaintiff in that case was the subject of an estimable 1,000 vile and derogatory signs, constant chanting of the epithet, "scab," jeering, gesturing, a rain of nuts, bolts and screws thrown at him, intentional cigarette burns, vandalism of his car and locker, and vulgarities about his wife. (**Id.**, at p. 983, fn. 12.) Examples of discrimination by a union in referring members for employment, accomplished by means that were not

sufficiently abusive to avoid preemption are presented in **Truex v. Garrett Freightlines, Inc.** (9th Cir. 1985) 784 F.2d 1347 (claim for emotional distress based upon a campaign of harassment in the assignment of work duties, abusive language and excessive surveillance was preempted); **Buscemi v. McDonnell Douglas Corp.** (9th Cir. 1984) 736 F.2d 1348, 1351-1352 (same result where plaintiff alleged emotional distress based upon the callous and insensitive manner of his termination); **Carter v. Sheet Metal Wkrs.' Intern. Ass'n, supra**, 724 F.2d at pp. 1477-1478 (same result with respect to a union conspiracy to prevent the plaintiff from working by refusing to issue a withdrawal card and then refusing to reinstate him); and **Magnuson v. Burlington Northern, Inc.** (9th Cir. 1978) 576 F.2d 1367, 1368-1369 (same result regarding defendants' cover-up of their negligence and conspiracy to have plaintiff discharged).

With these general principles in mind, we review the evidence. Before doing so, however, we consider whether defendants' motives for their actions are of any significance. Insofar as discrimination in referring for work is concerned, motive is irrelevant. For a state court to have jurisdiction, the discrimination must have been accomplished by abusive means. Objectionable motives are no substitute for objectionable means. Discrimination is forbidden by the NLRA whether it be for mildly ob-

jectionable motives or motives that are atrocious. The outrageousness of the motive is significant in determining liability under state law for the intentional infliction of emotional distress, but not in determining whether there has been federal preemption.

It is not contended that there was anything tortious in the fining of plaintiffs for operating a non-union shop while they were members of the union, or in expelling them for failure to pay the fine. They were denied readmission to the union for a period of several weeks, but the evidence shows no more than that they were not admitted. This may well have constituted unlawful discrimination, but it was not accomplished by abusive action.

When readmitted to the union, they were placed in book 4, the lowest priority for job referral. They readily concede, as they did at trial, that such placement was correct under the applicable written standards of the union, but argue that it was discriminatory because other union members were placed in a higher priority classification without being qualified therefor. Was this discrimination? The answer is probably yes. Was it done in an abusive manner? The answer is no. The union officer merely stated that plaintiffs would have to sign book 4.

There is evidence that plaintiffs were told to sell their business equipment if they desired to

qualify for a higher priority, which they did at a substantial loss. This, too, was discriminatory, but it was done by a plain statement that in itself was not abusively made.

Plaintiffs' business was refused a collective bargaining contract. At that time the business was defunct. There is no contention that the defendant local union was legally obligated to enter into such a contract with plaintiffs, and its refusal to do so was not abusive or tortious.

The discussion regarding welding is of little significance. Plaintiffs were offered an opportunity to go into a different field and they declined to do so. This led to no untoward result, was not discriminatory and was not done abusively.

The acts of harassment attributed to rank-and-file members of defendant local union are of no significance. There was no evidence, direct or circumstantial, that such activity was authorized or ratified by the local union or any of its officers or agents. For the same reason, we disregard complaints that plaintiffs' employer discriminated against plaintiffs with regard to overtime work and promotions. Although the employer's agent was a member of defendant local union, there was no evidence that he was anything but a rank-and-file member of the local union itself, or that he was acting on behalf of anyone other than the employer.

Plaintiffs claim that **Sears, Roebuck & Co. v.**

Carpenters (1978) 436 U.S. 180, has effectively overruled the controlling theory of preemption based upon the NLRB's primary jurisdiction over a wide range of labor disputes. **Sears** involved a state court action to enjoin picketing which constituted a continuing trespass under state law. The legality of the picketing was not otherwise addressed. (**Id.**, at p. 185.) The Supreme Court determined that preemption of the trespass action was **not** required for two reasons. First, the trespass action would not involve the federal labor issues of whether the picketing was legal; **only the location** of the picketing, a uniquely local concern, was challenged. (**Id.**, at p. 198.) **Sears** also held that when a claim of preemption is based upon conduct which is "arguably protected" under the NLRA, the aggrieved party suing in state court must have a "reasonable opportunity" to have the dispute resolved by the NLRB, either by filing a complaint itself or inducing its adversary to do so. (**Id.**, at pp. 200-201.) Otherwise, the dispute would be incapable of resolution since it would not be brought before the NLRB and preemption would preclude its resolution by state courts. (**Id.**, at p. 202.) Since such a stalemate had occurred in **Sears**, preemption was not required.

Here plaintiffs plainly had an opportunity to have the NLRB resolve their dispute with defendants had they so desired.

Plaintiffs also contend that federal preemption

has been limited by **Belknap, Inc. v. Hale, supra**, 463 U.S. 491. There the Supreme Court held that strike breakers could sue in state courts on a claim that the employer made misrepresentations to them and breached contracts concerning their continued employment after a strike ended. The claim of the strike breakers had nothing to do with the rights of the strikers, the strike, or collective bargaining, with which the NLRB was concerned. The dispute was peripheral to the NLRA and therefore subject to state court jurisdiction. That is far different than the claims with which we are concerned—discriminatory classification of union members in the administration of a union hiring hall, prohibited by **29 United States Code §158(b)**.

The order denying defendants' motion for judgment notwithstanding the verdict is reversed and the trial court is ordered to enter judgment for defendants.

Each side shall bear its own costs on appeal.

NOT TO BE PUBLISHED.

WILLARD, J.*

We concur:

STONE, P.J.
ABBE, J.

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*Retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council

Harry E. Woolpert, Judge
Superior Court County of San Luis Obispo

Ogle, Gallo & Merzon and Ray A. Gallo, for Plaintiffs and Appellants.

Crosby, Heafey, Roach & May and Richard de Saint Phalle and Joseph P. Mascovich, for Defendants and Respondents.

FILED
OCT 27 1983
Clerk U.S. District Court
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DORSEY DUNTON and DICK J. FLETCHER,

Plaintiffs,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, etc. et al.

Defendants.

NO. CV 83-3080 AWT
MEMORANDUM ORDER ON MOTION
TO DISMISS FIRST AMENDED COMPLAINT

Union defendants have moved to dismiss the first amended complaint on the ground that subject matter jurisdiction lies not with this Court but with the National Labor Relations Board. Because I find

that jurisdiction is proper in this Court, the motion is denied.

First Cause of Action

Plaintiffs have stated a claim under **29 U.S.C. §411(a)(4)**, which protects the right of members of a labor organization to bring suit to redress grievances. Plaintiffs allege that defendants attempted to coerce them to agree not to exercise this right. **Section 412** explicitly provides that a plaintiff who claims a violation of **Section 411** may bring a civil action in district court. Defendants' contention that this cause of action is actually a claim of unfair labor practice, and that therefore, the NLRB has exclusive jurisdiction, is without merit. The rights conferred by **Section 412** are cumulative and this Court may exercise jurisdiction over claims brought pursuant thereto, even though such claims may also constitute unfair labor practices under the National Labor Relations Act. **Cooke v. Orange Belt Dist. Council of Painters**, 529 F.2d 815 (9th Cir. 1976).

However, plaintiffs have not alleged facts sufficient to show a violation of **Section 411(a)(5)**. That section protects members of a labor organization from improper disciplinary action. No such improper disciplinary action has been alleged. That portion of paragrph 21 of the first amended complaint alleging a cause of action based on **Section 411(a)(5)**, therefore, is stricken.

Second Cause of Action

Plaintiffs have stated a sufficient claim for breach of the duty of fair representation on the part of defendant labor organizations since they have alleged denial of rights, bad faith and retaliation. Jurisdiction over such claims in federal district court is impliedl created by **29 U.S.C. §185**. **See Aguirre v. Automotive Teamsters**, 633 F.2d 168, 174 (9th Cir. 1980); **Amalgamated Association of Street Electric Railway Employees v. Lockridge**, 403 U.S. 274, 301, 91 S.Ct. 1909, 1925, 29 L.Ed.2d 473 (1971).

Third Cause of Action

Plaintiffs allege facts, including physical threats and intimidation, sufficient to state a claim under California law for intentional infliction of emotional distress. There is no federal protection for such conduct on the part of union officials. This cause of action, therefore, falls under the exception to NLRB preemption set forth in **Farmer v. United Brotherhood of Carpenters**, 430 U.S. 290 (1977). Pendent jurisdiction over this claim is proper. **UMW v. Gibbs**, 383 U.S. 715 (1966).

Fourth Cause of Action

Plaintiffs allege breach of a non-discrimination clause in a collective bargaining agreement entered into between the defendant labor organizations and an employers' group, including defendants Pacific Gas and Electric Company and Pull-

man Power Products Inc. **29 U.S.C. §185** explicitly provides jurisdiction in the district court over "suits for violation of contracts between an employer and a labor organization. . ." Such jurisdiction is proper over suits brought by an employee-union member. **Rehmar v. Smith**, 555 F.2d 1362 (9th Cir. 1976). In view of plaintiffs' claim that union defendants breached their duty of fair representation, this claim appears to be redundant as against them. It may, however, be of some consequence if plaintiffs decide to proceed against the employer defendants within the time previously allowed by the Court.

For the foregoing reasons, IT IS ORDERED:

1. Defendants' motion to dismiss is DENIED;

2. That portion of paragraph 21 of the first complaint alleging a cause of action (copy missing) **§411(a)(5)** (page 6, lines 18-27) is stricken;

3. Union defendants are granted 30 days from the of this order within which to answer the first amended complaint.

DATED: OCT 27 1983

A. WALLACE TASHIMA
United States District Judge

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

Date: February 13, 1987 Department No. IV
Presnt: HON. HARRY E. WOOLPERT, JUDGE
Isabel R. Ramos, DEPUTY CLERK
_____, BAILIFF _____, REPORTER

TITLE: COUNSEL:
DORSEY DUNTON, ET AL. Plaintiff(s)
Ray Gallo

v.s

UNITED ASSOCIATION OF JOURNEYMEN, et al.,
Defendant(s)
Richard de St. Phalle

NATURE OF HEARING: ACTION NO. _____
☐MISCELLANEOUS MINUTE ORDER
ORDER GRANTING NEW TRIAL
☐SPECIAL PROCEEDING:
NATURE OF HEARING:

This matter having been taken under submission previously, the Court now makes the following ruling:

The Court concludes no attack on the jury's verdict is meritorious, except the one claiming the evidence is insufficient to justify the verdict.

The verdict has two basic and fatal flaws:

1. No credible and sufficient evidence exists to hold any defendant liable for punitive damages. While there is more than sufficient evidence to convince the Court that employment discrimination occurred, and occurred at the specific request and with subsequent ratification of the defendants, the evidence is insufficient to lead any reasonable person to conclude that any acts, such as the "rat plumber" epithets and the "dead gopher incident" were accomplished at the request of ratification of any defendant. Nor did Stolper nor Ward do any act justifying punitive damages. Accordingly, the Court, even if it is wrong on ground number 2, would grant a new trial on the issue of punitive damages against the defendants.

2. The Court agrees with the plaintiffs' view that the law permits recovery for "discrimination plus." The problem with the evidence is that the evidence shows "discrimination" but no "plus." This is an intentional infliction of emotional distress case. There is no doubt but that these plaintiffs were distressed by the employment discrimination against them. But, despite the Court's great respect for jury verdicts, the Court cannot in good conscience con-

clude there was any such outrageous conduct committed by the defendants, or any of them, "which no civilized person should be compelled to endure." The employment discrimination here was not done in any particularly abusive manner. Insofar as employment discrimination is concerned, this is "garden variety" or ordinary employment discrimination. **Farmer v. Carpenters** (1977) 430 U.S. 290, and **Truex v. Garrett Freightlines, Inc.** 784 F.2d 1349 (9th Cir 1985)

Since the Court concludes that the evidence is insufficient to support the jury verdict, the Judgment on Special Verdict is ordered vacated and set aside, and a new trial is Granted.

DECERTIFIED
(For Information only)

ALPHA BETA, INC. et al., Petitioners,
v.
The SUPERIOR COURT of the State of California For the County of Alameda, Respondent, Rita NAHM, Real Party in Interest.
No. A025458.
Court of Appeal, First District, Division 5.
Feb. 26, 1988.

Former employee brought action against employer for intentional infliction of emotional distress. The Superior Court, Alameda County, denied employer's summary judgment motion, and employer petitioned for writ of prohibition or mandate. On retransfer for reconsideration, 236 Cal. 403, 735 P.2d 444, the Court of Appeal, King, J., held that: (1) employee's action was not preempted by federal labor law, and (2) employee was not required to exhaust remedies under grievance-arbitration provisions of collective bargaining agreement before bringing suit.
Petition denied.

1. Labor Relations —45
States—18.45

Employee's intentional infliction of emotional distress action in state court was not preempted by federal labor law, though her employment had been subject to collective bargaining agreement; whether her damage claims, asserted after her employment had terminated for reasons unrelated to claims, should be arbitrated under collective bargaining agreement could fairly be characterized as of peripheral concern to Labor Management Relations Act, and tort of intentional infliction of emotional distress was matter of legitimate local concern. Labor Management Relations Act, 1947, §1 et seq., 29 U.S.C.A. §141 et seq.

2. Labor Relations —45
States —18.45

Former employee's intentional infliction of emotional distress action in state court was not preempted by federal labor law, though her employment had been subject to collective bargaining agreement, where employee's action was based upon state tort law, independent of contract. Labor Management Relations Act, 1947, §§1 et seq., 301, 29 U.S.C.A. §§141 et seq., 185.

3. Labor Relations —45

States —18.45

Employee's action for intentional infliction of emotional distress was not preempted by federal labor law in that her allegations of personal abuse which were in no way related to her later termination, were not clearly related to imposition of discipline under collective bargaining agreement; even if they were related, moreover, they were sufficiently outrageous to escape preemption in that reference to collective bargaining agreement was unnecessary to resolve claim.

4. Labor Relations—416.1

Former employee was not required to exhaust remedies under grievance-arbitration provisions of collective bargaining agreement before bringing action for intentional infliction of emotional distress, in that employee's discharge was for reasons unrelated to her tort claim, and thus any relief available by way of arbitration would be meaningless to her and employer.

Henry F. Telfeian, Patrick W. Jordan, McLaughlin & Irvin, San Francisco, for petitioners.

No appearance for respondent.

Steven R. Cavalli, Gwilliam & Ivary, Oakland, for real party in interest.

KING, Associate Justice.

Rita Nahm was employed by Alpha Beta, Inc., from May 1980 through February 1982, and throughout that period was subject to a collective bargaining agreement between Local 870, Retail Clerks Union AFL-CIO, and Alpha Beta. Several months after her employment terminated Nahm sued Alpha Beta and its supervisory employees Cole and Coppin, in respondent superior court, for damages for intentional infliction of emotional distress. Defendants moved for summary judgment upon the theory that Nahm's tort action in respondent court was preempted by federal labor law. Respondent court denied defendants' motion; defendants petitioned this court for a writ of prohibition or mandate; we summarily denied the petition.

The California Supreme Court granted hearing and retransferred the matter to us with directions to issue an alternative writ, referring to **Beers v. Southern Pacific Transp. Co.** (9th Cir. 1983) 703 F.2d 425. We issued the alternative writ, heard oral argument, and concluded that respondent court's order was correct. In an opinion filed October 16, 1984, we vacated the alternative writ and denied the preemptory writ. The California Supreme Court denied review. The United States Supreme Court granted certiorari and remanded the case with directions that we reconsider our opinion in light of **Allis-Chalmers Corp. v. Lueck** (1985) 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206. We reconsid-

ered the matter and concluded, for the reasons set forth **infra**, that the holding of **Allis-Chalmers** did not affect our result. Accordingly, we reissued our original opinion denying the peremptory writ, with the addition of a brief explanation of our reasoning concerning the **Allis-Chalmers** opinion.

The California Supreme Court subsequently granted review. At the same time, the court granted review in **Friday v. Hughes Aircraft Co.** (1986) 188Cal.App.3d 117, 236 Cal.Rptr. 291. Upon finality of the court's subsequent decision in **De Tomaso v. Pan American World Airways, Inc.** (1987) 43 Cal.3d 517, 235 Cal.Rptr. 292, 733 P.2d 614, the court dismissed the grant of review in **Friday** as improvidently granted and retransferred the **Alpha Beta** case to this court. Cal.3d , 236 Cal.Rptr. 403, 735 P.2d 444. We were directed to reconsider our opinion in light of **Allis-Chalmers**, **De Tomaso**, the reinstated opinion in **Friday**, and **Truex v. Garrett Freightlines, Inc.** (9th Cir. 1985) 784 F.2d 1347. We have again reconsidered the matter, in light of the authority to which we have been referred, and we again conclude Alpha Beta's petition should be denied. We again reissue our original decision, as modified by a discussion of the authorities provided by the Supreme Court.

Nahm's complaint in respondent court alleged in pertinent part that "[a]t all times herein mentioned, defendant ... COLE was the assistant store

manager of the above mentioned Alpha Beta store. At all times herein mentioned, defendant... COPPIN was the manager of the bakery of the above mentioned Alpha Beta store. Commencing in approximately September of 1981, defendants above named and each of them, participated in episodes and encounters designed to harass, humiliate and upset plaintiff by, among other things, making rude and humiliating comments to and about plaintiff in front of customers and co-employees; decreasing her number of working hours below those of other employees who had less or the same seniority as plaintiff; degrading her job performance in front of others; causing plaintiff to perform the job duties of others; asking plaintiff to stay on and work overtime and then verbally abusing and chastising her fo doing so; making false statements in documents in plaintiff's personnel file to make it look as if plaintiff was being insubordinate to superiors; discriminating against plaintiff in favor of other employees; using foul and abusive language directed at plaintiff; refusing to honor plaintiff's request to be transferred to another store." The complaint further alleges that each defendant acted in all relevant respects as the agent of each other defendant, and that the described conduct was "outrageous" and caused Nahm emotional injury for which she is entitled to both compensatory and punitive damages.

There is no indication in the record before us that Nahm's allegations are in any way related to the termination of her employment.

Defendants moved for summary judgment on the sole ground "that the Complaint herein fails to state a cause of action against defendants in that it is preempted by federal law." In support of their e-motion defendants placed before the court the collective bargaining agreement, calling attention to its provision for processing "grievances" by voluntary adjustment or arbitration. The collective bargaining agreement defines a "grievance" as "a dispute, difference of opinion between the parties, and grievance of employees involving or arising out of the meaning, interpretation, application or alleged violation of this Agreement, including the arbitrability of all such matters." By the declaration of Alpha Beta's director of industrial relations defendants asserted that "[e]ach and every one of these incidents could have been the subject of a grievance and processed through the grievance and arbitration procedure contained in ... the collective bargaining agreement." Thus, defendants argued, "plaintiff's complaint is preempted by federal law in that the allegations therein constitute a single claim for breach of a collective bargaining agreement, the exclusive remedy for which is the grievance and arbitration provision contained in said agreement."

Nahm filed only legal argument in opposition. Respondent court denied defendants' motion. This writ petition followed. The only issue before this court is whether defendants' uncontradicted showing is sufficient to demonstrate as a matter of law that Nahm's claim cannot be maintained in a California trial court at this time. (Cf. **LaRosa v. Superior Court** (1981) 122 Cal.App.3d 741, 744-745, 176 Cal.Rptr. 224.)

Defendants identify two "questions presented for review":

"1. Does federal law preempt a state tort claim based on allegations identical to grievable events under a collective bargaining agreement?

"2. Can a state tort claim be maintained where in adjudicating the complaint the trial court will necessarily be required to interpret and apply a collective bargaining agreement?"

As stated and argued by defendants, these questions compound elements of two doctrines: Federal preemption (cf. **San Diego Unions v. Garmon** (1959) 359 U.S. 236, 242, 243, 79 S.Ct. 773, 778, 3 L.Ed.2d 775; **Sarro v. Retail Store Employees Union** (1984) 155 Cal.App.3d 206, 214-216, 202 Cal.Rptr. 102) and exhaustion of contractual arbitration procedures (**Johnson v. Hydraulic Research & Mfg. Co.** (1977) 70 Cal.App.3d 675, 679, 139 Cal.Rptr. 136; cf. Labor Management Relations Act §203(d) (**29 U.S.C. §173, subd. (d)**;

Steelworkers v. American Mfg. Co. (1960) 363 U.S. 564, 568, 80 S.Ct. 1343, 1346, 4 L.Ed.2d 1403).

We conclude that defendants' reliance on the rhetoric of federal preemption decisions is misplaced.

Defendants cite several cases decided under the Railway Labor Act (RLA) (45 U.S.C. §151 et seq.). But to the extent that this action is affected at all by federal labor law, it is subject not to the RLA but rather to the general provisions of the National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA) (29 U.S.C. §141 et seq.)

The RLA expressly provides for administrative determination of disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions...." (45 U.S.C. §153, subd. **First (i).)** It is now well established that these procedures are compulsory, and exclusive of judicial proceedings, in any dispute subject to the RLA. (**Andrews v. Louisville & Nashville R. Co.** (1972) 406 U.S. 320, 322-326, 92 S.Ct. 1562, 1564-)1566, 32 L.Ed.2d 95; **Magnuson v. Burlington Northern, Inc.** (9th Cir. 1978) 576 F.2d 1367, 1369-1370, cert. den. 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323.) "[T]he compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems not from any contractual undertaking be-

tween the parties but from the Act itself..." (**Andrews v. Louisville & Nashville R. Co., supra**, 406 U.S. at p. 323, 92 S.Ct. at p. 1565.) Our attention has been directed by our Supreme Court to **Beers v. Southern Pacific Transp. Co., supra**, (9th Cir. 1983) 703 F.2d 425 which we had rejected as inapplicable to this case when we summarily denied defendants' petition. Beers, employed under the terms of a collective bargaining agreement subject to the RLA, was discharged for alleged insubordination arising out of union activities. His state-court action for intentional infliction of emotional distress and violations of his rights under the RLA was removed to federal district court where summary judgment for defendants was granted on the ground that the court lacked subject-matter jurisdiction. The Court of Appeals affirmed the district court's finding that the controversy was "a minor dispute within the exclusive province of the grievance mechanisms of the Railway Labor Act" (703 F.2d at p. 429), relying on **Magnuson v. Burlington Northern, Inc., supra**, which in turn followed **Andrews v. Louisville & Nashville R. Co., supra.**

The NLRA and LMRA contain no provision directly comparable to "the exclusive ... grievance mechanisms" of the RLA. §203(d) of the LMRA (29 U.S.C. §173, subd. (d)) does provide that "[f]inal adjustment by a method agreed upon by the parties is

hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement," and the declaration that arbitration of grievances is "the very heart of the system of industrial self-government" (**Steelworkers v. Warrior & Gulf Co.** (1960) 363 U.S. 574, 581, 80 S.Ct. 1347, 1352, 4 L.Ed.2d 1409) has been often reaffirmed. But "the difference between the impact of the NLRA and the RLA has significance. The focus of the NLRA is on specific conduct that Congress has deemed subject to either prohibition or protection, 29 U.S.C. § § 157-158. Often ... it is the objective of certain conduct, rather than the mere exercise thereof, that is relevant to determining whether actions are protected or prohibited by the NLRA. In contrast, the RLA has made **any** grievance arising out of the collective bargaining agreement subject to the exclusive arbitral remedies contained in that Act... It follows from this difference that a state claim is more likely to impinge on an area of exclusive administrative jurisdiction under the RLA than under the NLRA." (**Jackson v. Consolidated Rail Corp.** (7th Cir. 1983) 717 F.2d 1045, 1052, cert. den. 465 U.S. 1007, 104 S.Ct. 1000, 79 L.Ed.2d 233; cf. also **Andrews v. Louisville & Nashville R. Co., supra**, 406 U.S. at p. 323, 92 S.Ct. at p. 1564.) This distinction is historically explicable: The RLA provisions for mandatory ad-

ministrative processing of minor disputes were part of a mechanism "designed to serve the stated purposes of the Act which were, among others: "To avoid any interruption to commerce or to the operation of any carrier engaged therein'..." (**Machinists v. Central Airlines** (1963) 372 U.S. 682, 687-689, 83 S.Ct. 956, 959-961, 10 L.Ed.2d 67; cf. also **Majors v. U.S. Air, Inc.** (D.Md. 1981) 525 F.Supp. 853, 855) ("[o]ne of the primary purposes of the Act is to minimize interruptions in the nation's transportation services by strikes and labor disputes".) No similar perceived need for swift determination of minor disputes has been associated with the NLRA or LMRA.

In sum defendants' RLA cases, in general, and **Beers v. Southern Pacific Transportation Co., supra**, are not dispositive in the circumstances of record here.

Nor do denfendants make a persuasive case for preemption under the leading judicial decisions in the NLRA/LMRA context. Most such decisions involve attempts in state courts to assert claims based upon alleged conduct which would constitute a violation of NLRA section 7 or an unfair labor practice under NLRA section 8. The basic principles were spelled out in **San Diego Unions v. Garmon, supra**, 359 U.S. 236, 79 S.Ct. 773: "[C]ongress has entrusted administration of the labor policy for the Nation to a centralized administrative

agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience... [¶]When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. [Fn. omitted.] However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. [Citation.] Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act. [Fn. omitted.] [¶] When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 ..., or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law...[¶].... When an

activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (359 U.S. at pp. 242-245, 79 S.Ct. at pp. 778-780.)

The limits of **Garmon**'s preemption rule were further explored in **Farmer v. Carpenters** (1977) 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338. Farmer's decedent, Hill, had been an officer of the carpenters' union local. He sued the union on various theories including intentional infliction of emotional distress. The California superior court permitted the emotional distress count to go to the jury, which awarded actual and punitive damages. A Court of Appeal reversed on the ground of preemption, holding "that the state courts had no jurisdiction over the complaint since the 'crux' of the action concerned employment relations and involved conduct arguably subject to the jurisdiction of the National Labor Relations Board" (430 U.S. at p. 295, 97 S.Ct. at p. 1060.) The California Supreme Court denied hearing, but the United States Supreme Court granted certiorari, vacated the judgment, and remanded, concluding in relevant part that Hill's claim was not preempted. The United States Supreme Court reiterated **Garmon**'s qualifications to the preemption rule for matters of "mere-

ly peripheral concern" and matters sufficiently "deeply rooted in local feeling" and added that "[w]e also have refused to apply the pre-emption doctrine 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not deserve the interests promoted by the federal labor statutes.' [Citations.]" (430 U.S. at pp. 296-297, 97 S.Ct. at pp. 1061-1062.)

Applying these principles to Hill's claim, the United States Supreme Court noted that "there is no federal protection for conduct on the part of union officers which is so outrageous that 'no reasonable man in a civilized society should be expected to endure it,'" and that California, "on the other hand, has a substantial interest in protecting its citizens from the kind of abuse of which Hill complained. That interest is no less worthy of recognition because it concerns protection from emotional distress caused by outrageous conduct, rather than protection from physical injury..." (430 U.S. at p. 302, 97 S.Ct. at p. 1064.) "Recovery for the tort of emotional distress under California law requires proof that the defendant intentionally engaged in outrageous conduct causing the plaintiff to sustain mental distress. [Citations.] The state court need not consider, much less resolve, whether a union discriminated or threatened to discriminate a-

against an employee in terms of employment opportunities [in violation of NLRA §8(b)]" (430 U.S. at p. 304, 97 S.Ct. at p. 1065.) The United States Supreme Court then qualified its position: "Union discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state-court tort action is based; to hold otherwise would undermine the pre-emption principle. ... Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." (430 U.S. at p. 305, 97 S.Ct. at p. 1066.)

[1] These principles appear to be applicable to Nahm's claim against defendants. The question whether Nahm's damage claims, asserted after her employment has terminated for reasons apparently unrelated to the claims, should be arbitrated under the collective bargaining agreement can fairly be characterized as of peripheral concern to the LMRA. No protected activity or unfair labor practice is implicated. Because Nahm's employment has terminated the value to her of remedies available through the arbitration process is problematic at best; to force arbitration in this case could advance the policy goals of federal labor law in only the most abstract sense. At the same time,

Nahm appears to have pleaded an orthodox case for recovery under California law for the tort of intentional infliction of emotional distress which is, as the United States Supreme Court recognized in **Farmer**, a matter of legitimate local concern. (Cf. e.g., **Alcorn v. Anbro Engineering, Inc.** (1970) 2 Cal.3d 493, 497-498, 86 Cal.Rptr. 88, 468 P.2d 216.)

We conclude that the preemption doctrine as stated in **Garmon** and qualified in **Farmer** does not bar state court action under the circumstances of the record before us. We adhere to this conclusion after reconsideration of the more recent authorities to which we have been referred.

The United States Supreme Court directed us to reconsider our decision in light of **Allis-Chalmers v. Lueck, supra**, 471 U.S. 202, 105 S.Ct. 1904. That case involved a state-law tort action for bad-faith handling of a disability insurance claim filed by an employee under an employer-provided health plan governed by a collective bargaining agreement. The court held the state-law action was preempted by federal law, specifically section 301 of the LMRA which provides for federal resolution of "suits for violation" of collective bargaining agreements. According to the **Allis-Chalmers** court, the preemptive effect of section 301 is based on the need for the stability provided by a uniform body of law governing labor contract interpretation.

"The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." (**Allis-Chalmers v. Lueck, supra**, 471 U.S. at p. 210, 105 S.Ct. at p. 1910, quoting **Teamsters Local** v. **Lucas Flour Co.** (1962) 369 U.S. 95, 103, 82 S.Ct. 571, 577, 7 L.Ed.2d 593.)

From this premise the court reasoned that the policy of uniform interpretation should not be limited to suits for breach of labor contracts, but should extend to any suit whose resolution necessarily involved the interpretation of contract terms and phrases or rights and remedies "rooted in" or "derivative" of the contract. The employee's bad-faith tort action was therefore preempted by federal law because it could not be resolved without analysis of the terms of the labor contract and the conduct of the parties thereto-specifically, whether the employer was under an implied contractual obligation to provide disability payments in a timely manner and whether the employer's conduct breached that obligation. Thus, the employee's action was "inextricably intertwined with consideration of the terms of the labor contract...[and the] state law [on which it was based] purport[ed] to define the meaning of the contract relationship." (471 U.S. at p. 213, 105 S.Ct. at p. 1912.)

Allis-Chalmers admits its holding is one of "narrow focus." (**Id.** at p. 220, 105 S.Ct. at p. 1916.) The court reiterated the long-standing rule that not every state suit "asserting a right that relates in some way to a provision in a collective bargaining agreement, or more generally to the parties to such an agreement, necessarily is preempted under §301." (**Ibid.**) Actions involving state rights and obligations which exist independently of contract, not subject to alteration or qualification by the process of negotiation, are not preempted. (**Ibid.**)

[2] Although the case before us arises from an employment context and involves the parties to a collective bargaining agreement, Nahm's claim for emotional distress is not preempted under the narrow holding of **Allis-Chalmers**. While the various incidents alleged by Nahm may be separately grievable under the agreement, the crux of the lawsuit is a pattern of outrageous emotional harassment which is outside the scope of preemption. Unlike the employee in **Allis-Chalmers**, Nahm does not complain of an instance of employer misconduct allegedly violating a contractual provision of a bargaining agreement. Rather, Nahm's claim is a straightforward state-law tort action for emotional distress caused by intentional, outrageous conduct. Recovery is based on Nahm's right, **independent of contract**, to be free from conduct so reprehensible that "no reasonable [person] in a

civilized society should be expected to endure it." (**Farmer v. Carpenters, supra**, 430 U.S. at p. 302, 97 S.Ct. at p. 1064.) The allegations fall outside the bounds of civilized employer behavior and thus are not "inexplicably intertwined" with interpretation of a labor contract. This conclusion is fully consistent with **Allis-Chalmers** court's own limitations of its holding.

This conclusion also withstands our second invitation to reconsider the matter, but the California Supreme Court. Our view of this case in light of **Allis-Chalmers** has just been discussed; the remaining three cases do not compel a contrary result.

In **Friday**, the employee brought a cause of action for emotional distress based on a "general pattern of harassment, [including an] assignment to work in an unventilated room with chemical fumes and a damp floor." (**Friday v. Hughes Aircraft Co., supra**, 188 Cal.App.3d at p. 124, 236 Cal.Rptr. 291.) **Friday** did not allege outrageous treatment unrelated to workplace issues but which happened to occur on the job; rather, he alleged treatment in relatiation for his complaints about dangerous handling of toxic chemicals, and a pattern of harassment designed to provoke him into quitting. (**Id.** at p. 120, 236 Cal.Rptr. 291.) Significantly, this alleged pattern was not outrageous conduct beyond the pale of civilized behavior, but direct complaints "about matters covered in the collective bargaining agreement: safety, unfair

work assignments, work restrictions and denials of promotion and overtime. Evaluation of [**Friday**'s] claim will necessarily involve reference to the relevant sections of the agreement to determine the parties' rights under it. (**Id.** at p. 125, 236 Cal.Rptr. 291.)

In **Truex**, the employee brought a distress claim based on excessive surveillance, abusive language, unjustified reassignments or work duties and "set ups" for termination. The Ninth Circuit found the cause of action preempted because the employer's conduct was covered by a collective bargaining agreement that specified how and when employee discipline was to be administered: the plaintiff's tort claim was a thinly-veiled claim "that administration of discipline was improper under the standards set by the collective bargaining agreement." (784 F.2d at p. 1350.) The court also found the conduct was **not** so extreme as to be outrageous and therefore outside the ambit of federal preemption.

Like **Friday, Truex** is distinguishable: Nahm's allegations involved gross conduct which is not "discipline" but simply uncivilized treatment. It may be noteworthy that the collective bargaining agreement is not described by Alpha Beta as governing the imposition of discipline, but only as making any employee dispute grievable. In **Tellez v. Pacific Gas and Elec. Co., Inc.** (9th Cir. 1987) 817 F.2d

536 the Ninth Circuit found a distress cause of action was not preempted where the complained-of conduct (circulation of a suspension letter falsely accusing the employee of selling cocaine on the job) was not governed by the collective bargaining agreement. In so doing the court distinguished **Truex** where the agreement was "[specific] when and how discipline could be administered." (817 F.2d at p. 539.) "Unlike the agreement[] in **Truex** ..., the present agreement is silent on work conditions, and vague on disciplinary formalities. It neither requires nor regulates suspension letters. Accordingly, examination or interpretation of the agreement would not help to resolve Tellez's [sic] claim." (**Ibid.**)

Finally, nothing in **De Tomaso** dictates a different result. The Supreme Court has referred us to 43 Cal.3d at pages 528 and 529, 235 Cal.Rptr. 292, 733 P.2d 614 of the **De Tomaso** opinion, which essentially restates the rule of **Allis-Chalmers** and of **Magnuson v. Burlington Northern, Inc., supra**, 576 F.2d 1367. In both **De Tomaso** and **Magnuson** the employer conducted an investigation of the employee

sployee's suspected misconduct, as required by the collective bargaining agreement. In both cases the employee attempted to sue for intentional infliction of emotional distress based on employer actions arising from the conduct or the result of that investigation. (In **Magnuson**, the employee alleged

a conspiracy to cover up supervisory negligence by making him a scapegoat; in **De Tomaso** the employee complained of wrongful termination and a false accusation that he was a thief.) In both cases the court held the subject of the suit had a substantial relationship to the collective bargaining agreement. (576 F.2d at pp. 1369-1370; 43 Cal.3d at pp. 528-529, 235 Cal.Rptr. 292, 733 P.2d 614.) **De Tomaso** holds a tort claim will be preempted unless it is based on facts either "unrelated to matters expressly or impliedly governed by the collective bargaining agreement" or which "so far exceed the scope of reasonable conduct in the context of such matters that reference to the collective bargaining agreement is unnecessary to resolve the claim." (43 Cal.3d at p. 529, 235 Cal.Rptr. 292, 733 P.2d 614 [footnote omitted].)

[3] Nahm's case avoids preemption under either prong of the **De Tomaso** test. Unlike the causes of action grounded directly in investigations, discipline imposition or other matters rooted in the collective bargaining agreement, Nahm's allegations of personal abuse—which are in no way related to her later termination—are not clearly related to imposition of discipline under the collective bargaining agreement. Even if they are, they are sufficiently outrageous to escape preemption under the second prong. Indeed, in the omitted footnote to the passage just quoted, the **De Toma-**

so court acknowledges preemption was defeated in one case where "the distress was based on a continual and egregious pattern of harassment by the employer." (See **Pikop v. Burlington Northern R. Co.** (Minn. 1986) 390 N.W.2d 743, cert. den. **sub nom. Burlington Northern R. CO. v. Gulati** (1987) U.S. , 107 S.Ct. 1616, 94 L.Ed.2d 800.) **Pikop**, cited by our high court with evident approval, holds that because a state "has a strong interest in protecting its citizens from outrageous emotional abuse," federal law does not preempt "a state-law claim of intentional infliction of emotional distress where the alleged distress results, not from wrongful discharge, but from a continual pattern of harassment on the part of the ... emplyer." (390 N.W.2d at p. 753.)

We conclude that Nahm's cause of action for emotional distress is not preempted by federal law.

[4] The remaining question is whether Nahm was required to exhaust remedies under the grievance-arbitration provisions of the collective bargaining agreement before she could bring her action in superior court.

"It is well established that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust the internal remedies before resorting to the courts in the absence of facts excusing such ex-

haustion. [Citations.] [¶] ...'[T]his rule, which is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts [citation], is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of such matters by a simple, expeditious and inexpensive procedure, and by persons who, generally, are intimately familiar therewith. [Citation.] The use of these internal remedies for the adjustment of grievances is designed not only to promote settlement thereof but also to foster more harmonious employee-employer relations. [Citation.] Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to follow through with the contract remedies.'" (**Johnson v. Hydraulic Research & Mfg. Co., supra**, 70 Cal.App.3d at pp. 679-680, 139 Cal.Rptr. 136.) This California rule is consistent with the strong federal policy in favor of arbitration of labor disputes under existing collective bargaining agreements. (Cf., e.g., **Steelworkers v. American Mfg. Co., supra**, 363 U.S. at p. 581, 80 S.Ct. at p. 1352; **Republic Steel v. Maddox** (1965) 379 U.S. 650, 652-653, 85 S.Ct. 614, 616-617, 13 L.Ed.2d 580.)

Defendants contend that every one of Nahm's allegations "arguably constitutes a breach of the collective bargaining agreement" and therefore that respondent court "will be forced to interpret the collective bargaining agreement.... Thus, the allegations contained in the complaint are inextricably intertwined with the collective bargaining agreement." "Nahm has chosen to disguise her dissatisfaction with the collective bargaining agreement as an action for intentional infliction of emotional distress. In truth, her complaint is an all-out assault on the collective bargaining process and arbitration of employment disputes."

If valid these contentions would tend to satisfy the exhaustion doctrine's requirement that the dispute be within the scope of the contract. But the contentions impermissibly distort Nahm's complaint which, in our view, plainly alleges a course of conduct intentionally undertaken for the purpose of inflicting emotional distress upon Nahm. Undeniably the collective bargaining agreement will be implicated, but only as it may have been used or disregarded in the course of the alleged "episodes and encounters designed to harass, humiliate and upset plaintiff." This is not a situation in which (as in cases on which defendants rely) a plaintiff has by "artful pleading" undertaken to disguise an alleged wrongful discharge or other direct violation of a collective bargaining agreement in tort rhetoric. This is

a legitimate tort complaint. In terms of the policies underlying the exhaustion doctrine, it is too late in this case to hope for a simple, expeditious and yet adequate disposition of Nahm's complaints or "to foster more harmonious employee-employer relations." Nahm is no longer an employee, and the relief which might have been available to her, as an employee, by way of the arbitration procedure—correction of allegedly improper entries in her personnel file, for example—would be all but meaningless, to her or to the labor-management relationship at Alpha Beta, now.

We conclude that the elements of the exhaustion doctrine have not been demonstrated and that, in any event, the doctrine in inappropriate to the circumstances of record.

The alternative writ of mandate is discharged. The petition for a preemptory writ of mandate is denied.

LOW, P.J., and HANING, J., concur.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 9016 Mission Boulevard, Riverside, California 92509.

On May , 1989, I served the within Petition for Writ of Certiorari on the interested parties in said action, by placing a true copy in each of four (4) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on May , 1989, at Riverside, California.

JACK GALLAGHER